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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CHAMMA KAREEM BRANDON,

Plaintiff

v.

TASBIRUL M. ALAM, in his individual capacity,

Defendant.

18 CV 10158 (NSR)
OPINION & ORDER

NELSON S. ROMÁN, United States District Judge

Pro se Plaintiff Chamma Kareem Brandon (“Plaintiff”)¹ commenced this civil rights action pursuant to 42 U.S.C. § 1983 against Dr. Tasbirul Alam (“Dr. Alam” or Defendant”) alleging that after Plaintiff filed a medical malpractice suit against Dr. Alam, Dr. Alam retaliated against Plaintiff in violation of his First Amendment rights by denying him a medical shower pass. (ECF No. 22.) Defendant answered the Complaint (ECF No. 13) and the case was referred to Magistrate Judge Davison for discovery (ECF No. 20). Discovery was completed in January 2020. (Minute Entry dated January 16, 2020.) Defendant moved for summary judgment. (ECF No. 46.) In opposition to Defendant’s motion, Plaintiff submitted and relied heavily upon the report of an expert dated April 20, 2020. (Exhibit C (ECF No. 54-3) and ECF No. 54.) In his reply, Defendant asked the Court to preclude this expert report under Federal Rule of Civil Procedure 37(c) because Plaintiff failed to disclose his intention to rely on an expert or the expert report during discovery. (ECF No. 55.) For the following reasons, the Defendant’s motion for summary judgment is DISMISSED without prejudice and discovery is reopened for the limited purpose of allowing Defendant to respond to Plaintiff’s expert report.

¹ Pro bono counsel appeared for the limited purpose of defending Plaintiff’s deposition and taking Defendant’s deposition (ECF Nos. 28, 39); but Plaintiff has otherwise proceeded pro se in this matter.

Federal Rule of Civil Procedure 26 mandates disclosure of expert witnesses and states that, “[u]nless otherwise stipulated or ordered by the court, this disclosure must be accompanied by a written report--prepared and signed by the witness --if the witness is one retained or specially employed to provide expert testimony in the case” Fed. R. Civ. P. 26(a)(2). Federal Rule of Civil Procedure 37(c) provides that “[i]f a party fails to provide information or identify a witness as required by Rule 26(a) . . . the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless.” Fed. R. Civ. P. 37(c). The Advisory Committee Notes for this rule explain that “lack of knowledge of a pro se litigant of the requirement to make disclosures” is an inappropriate basis for preclusion unless “the requirement for disclosure had been called to the litigant’s attention by either the court or another party.” Fed. R. Civ. P. 37(c), advisory committee’s note to 1993 amendment.

Neither the docket nor Defendant’s reply indicates that *pro se* Plaintiff was aware of the expert disclosure requirement. Accordingly, the Court finds that it would be inappropriate to preclude the expert report under Rule 37(c). That said, the Court agrees that Defendant would be prejudiced if the Court considered Plaintiff’s expert report in its review of the pending motion for summary judgment.

Accordingly, the Court DENIES Defendant’s motion for summary judgment without prejudice and orders that discovery be reopened in light of Plaintiff’s post-discovery retention of an expert so that Defendant has an opportunity to address expert report and conduct additional discovery as necessary. The Court will refer the governance of the expert discovery to Magistrate Judge Davison and the parties are directed to contact Magistrate Judge Davison within seven days of the date of this Opinion.

The Clerk of Court is directed to terminate the motion at ECF No. 46 and mail a copy of this order to pro se Plaintiff at the address listed on ECF and show service on the docket.

Dated: April 7, 2021
White Plains, New York

SO ORDERED:

A handwritten signature in dark ink, appearing to read "Nelson S. Román", is written over a light gray rectangular background.

NELSON S. ROMÁN
United States District Judge